

PRIVATE PROCESS

Case Number: 2020-CI-05938



2020CI05938 500002

CLARISSA BOTELLO

VS.

COSTCO WHOLESALE CORPORATION

(Note: Attached Document May Contain Additional Litigants.)

 IN THE DISTRICT COURT
 166th JUDICIAL DISTRICT
 BEXAR COUNTY, TEXAS

CITATION

"THE STATE OF TEXAS"

Directed To: COSTCO WHOLESALE CORPORATION

BY SERVING ITS REGISTERED AGENT, CT CORPORATION SYSTEM

"You have been sued. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after you were served this CITATION and ORIGINAL PETITION AND REQUEST FOR DISCLOSURE, a default judgment may be taken against you." Said ORIGINAL PETITION AND REQUEST FOR DISCLOSURE was filed on the 20th day of March, 2020.

ISSUED UNDER MY HAND AND SEAL OF SAID COURT ON THIS 20TH DAY OF MARCH A.D., 2020.

 BYRON B MILLER
 ATTORNEY FOR PLAINTIFF
 918 S ALAMO ST
 SAN ANTONIO, TX 78205-3419

MARK HERNANDEZ

MAR 31 2020

CRT
MA
 Mary Angie Garcia
 Bexar County District Clerk
 101 W. Nueva, Suite 217
 San Antonio, Texas 78205

By: Alexandra Johnson, Deputy

 CLARISSA BOTELLO
 VS
 COSTCO WHOLESALE CORPORATION

Officer's Return

 Case Number: 2020-CI-05938
 Court: 166th Judicial District Court

I received this CITATION on _____ at _____ o'clock ____ M. and () executed it by delivering a copy of the CITATION with attached ORIGINAL PETITION AND REQUEST FOR DISCLOSURE the date of delivery endorsed on it to the defendant, _____ in person on the _____ at _____ o'clock ____ M. at: _____ or () not executed because _____

Fees: _____ Badge/PPS #: _____ Date certification expires: _____

_____ County, Texas

By: _____

OR: VERIFICATION OF RETURN (If not served by a peace officer) SWORN TO THIS _____

NOTARY PUBLIC, STATE OF TEXAS

OR: My name is _____, my date of birth is _____, and my address is _____

I declare under penalty of perjury that the foregoing is true and correct. Subscribed in _____ County, State of Texas, on the _____ day of _____, 20____.

Declarant



FILE COPY (DK002)

DOCUMENT SCANNED AS FILED

FILED
3/20/2020 12:09 PM
Mary Angie Garcia
Bexar County District Clerk
Accepted By: Brenda Carrillo



Cause Number: 2020CI05938
District Court : 166th

**Mary Angie Garcia
Bexar County District Clerk**

citpps/sac2

Request for Process

Style: Clarissa Botello Vs. Costco Wholesale Corporation

Request the following process: (Please check all that Apply)

☒ Citation ☐ Notice ☐ Temporary Restraining Order ☐ Notice of Application for Protective Order
☐ Temporary Protective Order ☐ Precept with hearing ☐ Precept without a hearing ☐ Writ of Attachment
☐ Writ of Habeas Corpus ☐ Writ of Garnishment ☐ Writ of Sequestration ☐ Capias ☐ Other: _____

1.

Name: Costco Wholesale Corporation

Registered Agent/By Serving: CT Corporation System

Address: 1999 Bryan St., Suite 900, Dallas, Texas 75201

Service Type: (Check One) ☒ Private Process ☐ Sheriff ☐ Commissioner of Insurance ☐ SA Express News ☐ Hart Beat ☐ Courthouse Door
☐ Certified Mail ☐ Registered Mail ☐ Out of County ☐ Secretary of State ☐ Constable Pct _____
(Pct. 3 serves process countywide)

2.

Name: _____

Registered Agent/By Serving: _____

Address: _____

Service Type: (Check One) ☐ Private Process ☐ Sheriff ☐ Commissioner of Insurance ☐ SA Express News ☐ Hart Beat ☐ Courthouse Door
☐ Certified Mail ☐ Registered Mail ☐ Out of County ☐ Secretary of State ☐ Constable Pct _____
(Pct. 3 serves process countywide)

3.

Name: _____

Registered Agent/By Serving: _____

Address: _____

Service Type: (Check One) ☐ Private Process ☐ Sheriff ☐ Commissioner of Insurance ☐ SA Express News ☐ Hart Beat ☐ Courthouse Door
☐ Certified Mail ☐ Registered Mail ☐ Out of County ☐ Secretary of State ☐ Constable Pct _____
(Pct. 3 serves process countywide)

4.

Name: _____

Registered Agent/By Serving: _____

Address: _____

Service Type: (Check One) ☐ Private Process ☐ Sheriff ☐ Commissioner of Insurance ☐ SA Express News ☐ Hart Beat ☐ Courthouse Door
☐ Certified Mail ☐ Registered Mail ☐ Out of County ☐ Secretary of State ☐ Constable Pct _____
(Pct. 3 serves process countywide)

Title of Document/Pleading to be Attached to Process: Plaintiff's Original Petition

Name of Attorney/Pro se: Byron B. Miller Bar Number: 24074716

Address: 918 South Alamo St. Phone Number: (210) 228-0400
San Antonio, Texas 78205

Attorney for Plaintiff ☒ Defendant ☐ Other ☐

****IF SERVICE IS NOT PICKED UP WITHIN 14 BUSINESS DAYS, SERVICE WILL BE DESTROYED****

FILED
 3/20/2020 11:52 AM
 Mary Angie Garcia
 Bexar County District Clerk
 Accepted By: Martha Medellin

WJD

CAUSE NO. **2020CI05938**

CLARISSA BOTELLO,	§	IN THE DISTRICT COURT
	§	
PLAINTIFF,	§	
	§	
VS.	§	<u>166th</u> JUDICIAL DISTRICT
	§	
COSTCO WHOLESALE CORPORATION,	§	
	§	
DEFENDANT.	§	BEXAR COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION AND REQUEST FOR DISCLOSURE

Plaintiff, Clarissa Botello, files this Original Petition, complaining of Costco Wholesale Corporation (hereinafter "Defendant").

I. Discovery Control Plan

1. Pursuant to Tex.R.Civ.P. §190.1, Plaintiff intends to conduct discovery under Level 3.

II. Parties

2. Plaintiff, Clarissa Botello, is an individual residing in San Antonio, Bexar County, Texas.
3. Defendant, Costco Wholesale Corporation is a company doing business in Texas, which may be served with process through its registered agent, CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201-3136.

III. Venue and Jurisdiction

4. Venue is proper in Bexar County because at the time the claims accrued Defendant resided in Bexar County, and the events/omissions giving rise to the cause of actions made the basis of this litigation occurred in Bexar County, Texas.
5. This Court has jurisdiction because the claims and causes of action herein have resulted in damages to Plaintiff within the jurisdictional limits of this Court and arise under the statutory and common law of the State of Texas.

6. Plaintiff is prohibited by Tex. Civ. Prac. & Rem. Code §74.053 from specifying the amount claimed in damages. As such, Plaintiffs are not required to meet the requirements of newly amended Tex. R. Civ. Pro. 47(c) and hereby inform the court and Defendant that, pursuant to Tex. R. Civ. Pro. 169(a)(2), the expedited actions process does not apply to a suit in which a party had filed a claim governed by Chapter 74 of the Civil Practice & Remedies Code.

IV. Notice of Claim Requirements and Statute of Limitations

7. Pursuant to the provisions of Tex. Civ. Prac. & Rem. Code §74.051, Plaintiff provided notice to Defendant on June 5, 2019, under the requirements of Tex. Civ. Prac. & Rem. Code §74.051 and 75.052. Notice was appropriately accompanied by a medical authorization in the form required. As such, the applicable statute of limitations has been tolled and includes a period of 75 days following the giving of the notice, and the tolling applies to all parties and potential parties to this action. *See* TEX. CIV. PRAC. & REM. CODE §74.051(c).

V. Cause of Action

A. Background

8. On June 7th, 2018 Ms. Clarissa Botello presented to Dr. Jeneby's office for a preoperative appointment in preparation to undergo a procedure. At that time, among other prescriptions, she was prescribed the antibiotic cefadroxil (Duricef®) 500 mg and directed to begin the prescription three days prior to the procedure and continue it until the medication is finished.
9. Ms. Botello had the Duricef® prescription filled at Costco Pharmacy. When she picked up her antibiotic prescription she was erroneously given a prescription for another

patient. The prescription she received in error was the antibiotic Levaquin® (levofloxacin) which was 500 mg, the same strength as the Duricef® she was supposed to have been dispensed. She reportedly began taking the Levaquin® on June 12th, 2018 three days prior to her scheduled procedure.

10. Ms. Botello underwent the procedure on June 15th, 2018 without complications.
11. A little more than two weeks later, while kicking a soccer ball with her son, she injured her heel. That same day, June 27th, 2018 she presented to Santa Rosa Medical Center Emergency Department where she was evaluated and diagnosed with a ruptured Achilles tendon. She was placed into a posterior splint and crutches.
12. On July 2nd, 2018 Ms. Botella followed up with Dr. Pollak of San Antonio Podiatry Associates. Dr. Pollak reported that she had been non-weight bearing over the previous several days. She was still having pain, and could not walk on her foot secondary to tenderness. Dr. Pollack placed her left ankle in an Ace Bandage and instructed her to ice her left Achilles tendon daily and dispensed a walking boot to maintain the foot in 90 degrees with the leg. Also to continue to use ibuprofen and the crutches to limit ambulatory weight bearing activity.
13. She presented for follow up with Dr. Pollak on July 27th, 2018 reporting that she had been wearing the walking boot daily, but continued to have tenderness with respect to the left Achilles tendon. He recommended she continue use of the walking boot and anti-inflammatories as needed for pain.
14. Fluoroquinolone antibiotics, including Levaquin®, have been associated with disabling and potentially irreversible serious adverse reactions from different body systems that can occur together in the same patient.

15. The increased risk of tendinitis and tendon rupture is in all ages. The adverse reaction most frequently involves the Achilles tendon and has also been reported with the rotator cuff (shoulder), the hand, biceps, the thumb, and other tendon sites. Tendinitis or tendon rupture can occur within hours or days of starting Levaquin® or as long as several months after completion of fluoroquinolone therapy.

16. Ms. Botello continues to suffer significant daily consistent pain, impairment, and requires consistent pain management.

B. Negligence of Defendant

17. The standard of care required Costco Pharmacy staff to ensure that Clarissa Botello received the correct medication at the correct dose with the correct directions via the correct route of administration. This standard of care was breached when staff at Costco Pharmacy dispensed a medication to Ms. Botello that was not prescribed to her nor intended for her.

18. Counseling was not performed when Ms. Botello's prescription was picked up. A last step in the process that could have detected the dispensing error preventing, the adverse reactions Ms. Botello suffered as a result of taking a medication not intended for her.

C. Damages

19. As a direct and proximate result of the Defendant's negligence, Plaintiff seeks recovery of the following elements of damages:

- a. Pecuniary damages sustained in the past, and that in reasonable probability, will be sustained in the future;
- b. Pain and mental anguish sustained in the past and that, in reasonable probability, will be sustained in the future;
- c. Medical expenses sustained in the past and that in reasonable probability, will be sustained in the future;
- d. Impairment sustained in the past and that, in reasonable probability, will be sustained in the future;

e. Pre-judgment and post-judgment interest as permitted by law.

20. In addition to the foregoing, Plaintiff is entitled to recover prejudgment and post-judgment interest as permitted by law. Plaintiff's damages are within the jurisdictional limits of the Court.

X. Notice of Reliance Pursuant to Rule 193.7

21. Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiff hereby gives notice of intent to utilize all documents and tangible items produced by any party through discovery, together with all deposition exhibits and documents obtained by written questions, in any pre-trial proceeding and/or trial.

XI. Request for Notice of Criminal Convictions

22. Pursuant to Rule 609 of the Texas Rules of Civil Evidence, request is hereby made for written notice of intent to use evidence of a conviction, if any, against any of the witnesses named by Plaintiff as persons with knowledge of relevant facts. Sufficient advance written notice of intent to use such evidence is requested to provide a fair opportunity to contest the use of such evidence. Said notice is requested not later than thirty (30) days before trial.

VI. Jury Demand

23. Plaintiff hereby demands a trial by jury on all issues herein.

VIII. Chapter 74 Damage Caps Unconstitutional

24. To the extent that Defendant intends to attempt to rely upon Sections 74.301, 74.302, or 74.303 of the Texas Civil Practice & Remedies Code to limit Plaintiff's recovery of non-economic damages, Plaintiff contends that the limitations imposed by those statutory provisions are unconstitutional in that they violate the right to jury trial guaranteed by the

United States and Texas Constitutions.

IX. Notice of Intention to Take Oral/Video Depositions

25. By filing this petition Plaintiff puts Defendant on notice of her intention to take the oral/video depositions of the following persons: the pharmacist responsible for dispensing the Levaquin and the supervisor for the pharmacist in question at the time of the incident made the basis of this litigation. Accordingly, Plaintiffs request that counsel for Defendant immediately contact Plaintiff's counsel to set up mutually convenient dates and times for the taking of the Defendant witnesses' depositions.

X. Request for Disclosure

26. In accordance with Tex. R. Civ. P. 194, Defendant is requested to disclose within fifty (50) days of service of this request, the material described in Tex. R. Civ. P. 194.2(a)-(l).

Prayer

Wherefore, premises considered, Plaintiff, Clarissa Botello requests that Defendant be cited to appear and answer, and that upon final trial hereof, Plaintiff have judgment against Defendant, for the damages pleaded herein, together with pre-judgment and post-judgment interest at the highest legal rate, costs of court, and such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully submitted,

Maloney Law Group, PLLC
918 S. Alamo St.
San Antonio, Texas 78205
Telephone: (210) 228-0400
Facsimile: (210) 758-5908

By: /s/ Byron B. Miller
BYRON B. MILLER, State Bar No. 24074716

byron@maloneylawgroup.com

MICHAEL MALONEY, State Bar No. 12883300

mikem@maloneylawgroup.com

ERICA MALONEY, State Bar No. 24085698

ericam@maloneylawgroup.com

ATTORNEYS FOR PLAINTIFF